Supreme Court, U.S.
FILED

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SUPREME COURT OF THE UNITED STATES

October Term, 1995

Robert J. Laffond
Petitioner,

vs.

Commonwealth of Massachusetts
Respondent.

Petition for Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

Petition for Writ of Certiorari

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39 pp

QUESTIONS PRESENTED FOR REVIEW

I. Can a Defendant be charged with failure to have a refuse removal permit and then be convicted solely on an Agreed Statement of Facts that is unrelated to the charge and that does not prove any essential elements of the prosecution's case?

II. Can a Town limit highway access to a refuse truck, engaged in interstate commerce, by limiting the hours the truck may pass, empty or full, through residential streets which are the only route between the central truck terminal and the highways?

III. Can a Town restrict the range of operation and thereby limit the out of state customers an interstate trucking business may serve through a health regulation enacted to control the hours of refuse collection in residential neighborhoods?

IV. Can a Town restrict the hours of operation of empty trucks, engaged in interstate trucking, with a health regulation enacted to control the hours of refuse collection in residential neighborhoods?

V. Can a Town enact and enforce a health regulation against empty garbage trucks when such a regulation exceeds the enabling legislation enacted by the Massachusetts Legislature?

VI. Does the Dalton, Massachusetts Health Regulation, "Transportation of Garbage on Public Ways" violate the Commerce Clause of Art.1, §8 of the United States Constitution?

LIST OF ALL PARTIES TO THE PROCEEDING

1. Commonwealth of Massachusetts

OPINIONS DELIVERED IN THE CASE

2. Robert J. Laffond

3. No Corporation is involved.

TABLE OF CONTENTS

Questions Presented for Review i
List of All Parties
to the Proceedings ii
Table of Contents iii
Table of Authorities iv
Opinion Below 1
Jurisdiction of this Court 2
Constitutional Provisions,
Statutes, Ordinances and
Regulations Involved 2
Statement of the Case 5
Point that Federal Questions
Were Raised 10
Reasons Relied Upon for
Allowance of the Writ 17
Conclusion 19
APPENDIX A-1

TABLE OF AUTHORITIES

7 Am Jur 2d §7 . . . . . 10 & 12
7 Am Jur 2d §11 . . . . . 10 & 12
28 USC §1257 2
Buck vs. Kuykendall 10
Castle vs. Hayes Freight Lines, Inc. 10
Cawley v. Northern Waste Co. 11
City of Boston vs. A. W. Perry, Inc. 11
City of Philadelphia vs. New Jersey, et al 13
Dalton Health Regulation . . . . . 4 & 7
Diamond Waste, Inc. vs. Monroe County, GA. 15
Enabling Statute M. G. L. c.111, §31A & B . . . . . 3 & 5
George W. Bush & Sons Co. vs. Maloy 10
Mass. Const. Amend. Art. 2, §6 3
Peconic Avenue Businessmen's Association vs. Brookhaven 11
Pike v. Bruce Church, Inc. 14
USC Constitution Amendment 5 4
USC Constitution Amendment 14 4
USC Constitution Art. 1, §8 . . . . . 2 & 18
West Lynn Creamery et al vs. Jonathatn Healy, Commissioner of the Department of Food and Agriculture 14

In The
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OPINION BELOW

The only opinion delivered in this case was produced by the Appeals Court for the Commonwealth of Massachusetts on September 29, 1995 as

Case No. 94-P-1961. A petition for rehearing was filed by Robert J. Laffond and denied on October 26, 1995.

JURISDICTION OF THIS COURT

An Application for Further Appellate Review was filed in the Supreme Judicial Court of Massachusetts and was denied on November 27, 1995, without an opinion.

Jurisdiction is based upon 28 USC §1257 which provides for Supreme Court review of final judgments of the highest court of a State by Writ of Certiorari where the validity of a State statute is drawn into question as being repugnant to the Constitution or where Constitutional immunity or protection is claimed.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The Commerce Clause at Art. 1, §8 of the United States Constitution provides that "Congress shall have power to regulate commerce with foreign nations, and among the several states."

The power of the Town to enact the Regulation is derived from the Massachusetts Home Rule Amendment (Const. Amend. Art. 2, §6) which is set forth below:

> Section 6. *Governmental Powers of Cities and Towns.* - Any city or town may, by the adoption, or repeal or local ordinances or by-laws, exercise any power or function which the general court has power

to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

The Massachusetts enabling legislation that allows Dalton to enact the subject Health Regulation is contained in M. G. L. c.111, §31B which is limited by M. G. L. c.111, §31A, the applicable portions which are set forth below:

> §31A Permit for removal or transportation of garbage; application; exemptions - ... provided, however, that no rules or regulations shall restrict the hours of the day when garbage, offal or other offensive substances may be collected in areas zoned for business, commercial or industrial use.

M.G.L. c.111, @ 31B provides:

> Boards of health shall, from time to time, make rules and regulations for the control of the removal, transportation or disposal of garbage, offal or other offensive substances. Whoever violates any provision of section thirty-one A, or any rule or regulation made thereunder, shall be punished by a fine of not more than one thousand dollars.

This case concerns the Board of Health Regulation entitled *Transportation of Garbage on Public Ways*. The regulation, provides, [As quoted from the Town Notice Signed/Adopted: July 12, 1993 and Published 7/16/93]:

In order to limit noise and odor and provide peace of mind within the residential zoning districts of the Town of Dalton, the Board of Health, pursuant to M. G. L. c.111, §31B, hereby adopts the following regulation:

> Effective August 1, 1993, no removal, transportation or disposal of garbage, refuse, recyclable materials, offal or other offensive substances **or empty refuse vehicles**, shall be permitted in any residential district between the hours of 7:00 p.m. and 7:00 a.m., Monday through Sunday. Violation of this regulation will result in a fine of $1,000. Each offense will be deemed a separate violation. If any portion, sentence or clause is subsequently held to be invalid, the remainder of the regulation shall be in full force and effect. (emphasis added)

/s/ Board of Health, Vivian I. Mason, John W. Bartels, Sr., and Paul C. Carter.

USC Constitution Amendment 5 of the United States Constitution provides that "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

USC Constitution Amendment 14 of the United States Constitution provides that "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A Summons and Complaint was filed against Robert J. Laffond on October 28, 1993 under the heading of "PERMIT FOR REMOVAL OR TRANS. OF GARBAGE C111 §31A" and charging that he, "did remove or transport garbage, offal or other offensive substances through the street of any city or town, to wit: Dalton, without first obtaining a permit from the board of health of said city or town in violation of G.L.C. 111,s.31A."

BACKGROUND

Berkshire Clean-Way and Rubbish Removal, Inc. (BCI) is Mr. Laffond's employer and has been operating a recycling and trash hauling business at it's current location since the 1970s. The BCI facility consists of an office, garage and recycling facilities located at 10 Park Avenue in the Town of Dalton. BCI's business activities have been made possible by zoning variances previously granted by Dalton. BCI's facility is clustered together with the now closed Town Landfill, the Dalton Town Garage and Transfer Facility and the Petricca Gravel mining operation, all of which use large trucks and heavy equipment. The Dalton Town Garage and Transfer Facility are on Town land while the Town Landfill, BCI operations and the Petricca Gravel pit are on land owned by the Warren family.

BCI Equipment, Dalton Town Trucks and Petricca Vehicles must all travel through an adjacent residential district to enter or leave their places of business. Neighbors have complained about the commercial traffic that must travel through their residential neighborhood.

BCI currently operates the Dalton Town Transfer Station adjacent to the Town Garage which is located very close to BCI's facility. Usually the refuse carried on the truck driven by Mr. Laffond is Dalton Rubbish on its way to

a Recycling Facility or to be disposed of at an incinerator or landfill.

BCI trucks must start very early in the morning to pick up waste and transport the waste to incinerators and land fill locations that are a great distance from Dalton and that close in the early afternoon. BCI trucks must also start very early to get recyclable materials to markets at the times deliveries are allowed by the markets.

From time to time BCI receives emergency calls to remove ash from municipal incinerators that operate on a 24 hour basis. Failure to remove the ash would choke the incineration operation and require a shutdown with severe consequences.

The typical refuse material is inflammable with about half the energy content of the same weight of coal. BCI often receives emergency calls in the night time from municipal fire departments to remove burning containers of refuse to an incinerator to be safely disposed of. This is the usual method of dealing with fires in large containers and large compactors.

Current Town officials have opposed BCI doing business at it's current location, despite variances previously granted, and have refused to sign the Commonwealth's Environmental sight designation certificate necessary for BCI to get the Environmental approvals to operate. The enactment and enforcement of the Health Regulation now before this court appears to be another tool to drive BCI operations out of Dalton.

There were guilty findings when this case was submitted to the Central Berkshire District Court and then on appeal to the Jury Session of that court with Jury waived, based upon the following Agreed Statement of Facts:

1. This matter concerns a Board of Health Regulation

entitled *Transportation of Garbage on Public Ways* (hereinafter referred to as "the Regulation"). The regulation provides:

> Effective August 1, 1993, no removal, transportation or disposal of garbage, refuse, recyclable materials, vehicles, shall be permitted in any residential district between the hours of 7:00 p.m. and 7:00 a.m., Monday through Sunday. Violation of this regulation will result in a fine of $1,00~. Each offense will be deemed a separate violation. If any portion, sentence or clause is subsequently held to be invalid, the remainder of the regulation shall be in full force and effect./s/ Board of Health, Vivian I. Mason, John W. Bartels, Sr., and Paul C. Carter.

The regulation was adopted pursuant to the provisions of M.G.L. c.111, §31B "in order to limit noise and odor and provide peace of mind within the residential zoning district of the Town of Dalton."

The regulation became effective on July 16, 1993 in accordance with the provisions of MGL c. 111, §31.

2. On August 4, 1993, Dalton Police Officer Rene J. Bonneau observed a truck with the name Berkshire Cleanway on the side travelling on a residential street, specifically Park Avenue, in Dalton, at 5:19 a.m. in the morning. A picture of the truck is attached as Exhibit A.

3. Officer Bonneau observed that the truck cab was brown, and the attached trailer contained two bins, one painted green and the other brown.

4. Officer Bonneau stopped the vehicle and informed the driver that he was in violation of the Regulation.

5. The driver identified himself to Officer Bonneau as Robert J. Laffond.

6. Robert J. Laffond presented Officer Bonneau with a commercial registration for the truck and for its trailer that

indicated that Berkshire Cleanway Rubbish Removal, Inc. (BCI) was the owner of the vehicle. Mr. Laffond stated to Officer Bonneau that BCI was the owner of the vehicle. Officer Bonneau recorded Mr. Laffond's driver's license number and the two registration numbers for the commercial cab and trailer.

7. BCI engaged in the interstate trucking of waste and recyclable materials. BCI has a single place of business; consisting of an office, garage and recycling facilities located at 10 Park Avenue (also known as Bridle Path Road) in the Town of Dalton, Berkshire County, Commonwealth of Massachusetts with a zip code of 01226. In addition, BCI has parked up to two trucks, without containers, at Freadman Steel, in Pittsfield, Massachusetts.

8. On September 22, 1993, Officer Bonneau stopped Mr. Laffond at 5:36 a.m. on Park Avenue Extension, in Dalton, while driving the same vehicle shown in Exhibit A. The truck contained construction and demolition debris. The parties agree that the Dalton police report dated 9/23/93 pm case 93-09-1282 be attached. Any facts in the police report that are inconsistent with the facts herein are not accepted. Allegations in para. 3 and 4 of the police report regarding BCI intentions to violate the Regulation are not agreed to by Mr. Laffond.

9. The location of BCI is shown on the Regional Locus Map, drawn by Hill Engineers, Architects, Planners and attached as Exhibit B. The only approach to or exit from the BCI place of business is over High Street or Park Avenue Extension, both of which are residential streets in the Town of Dalton.

10. The truck driven by Mr. Laffond at the time he was stopped by Officer Bonneau had been parked the evening before at the BCI place of business at 10 Park Avenue Extension in the Town of Dalton. Mr. Laffond was

leaving the BCI garage at the time he was stopped by Officer Bonneau.

11. Officer Bonneau prepared a report of the incident and forwarded the report to the Chief of Police. Sergeant Lawrence Higgins, Acting Chief of Police, forwarded the incident report of the violation of the Regulation to the Town of Dalton Board of Health.

12. On September 24, 1993, Police Chief Daniel Filiault, at the direction of the Town of Dalton Board of Health, filed an application for a Complaint to issue against Mr. Laffond for violation of the Regulation.

13. On October 28, 1993, a hearing was held in the Pittsfield District Court on the Town of Dalton's application for a Complaint. The driver, by and through his attorney, moved to dismiss the matter.

14. On March 17, 1994, at a pre-trial conference, the Court (Barbalunga, J.) allowed defendant to resubmit his Motion to Dismiss and set a hearing on that Motion to Dismiss for May 6, 1994 at 9:00 a.m. at the Pittsfield District Court. The parties agreed at the pre-trial conference that the matter probably could be submitted on an Agreed Statement of Facts. On May 6, 1994, the Court ordered the parties to file any memoranda by May 27, 1994 and scheduled the matter for disposition on June 2, 1994.

/s/ Leslie R. Long, Esq.

Dated: May 26, 1994 /s/ Joel B. Bard, Esq.

The case was appealed to the Appeals Court of Massachusetts where judgment was affirmed on September 29, 1995 and rehearing was denied on October 26, 1995. A Petition for Further Appellate Review was filed with the Supreme Judicial Court of Massachusetts and was denied November 27, 1995 without an opinion.

POINT THAT FEDERAL QUESTIONS WERE RAISED

Arguments raised in Robert Laffond's Motion to Dismiss at the District Court and Jury Session level:

The right of a citizen to travel upon the public highways and to transport his property thereon ... is not a mere privilege which the municipality may permit or prohibit at will, but a common right which the citizen has under his right of life, liberty, and the pursuit of happiness. (7A Am Jur 2d §7) It is well settled that the use of highways and streets by vehicular or pedestrian traffic may be limited, controlled, and regulated by the responsible public authority in the exercise of the police power whenever, and to the extent necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people.... However, the power to regulate vehicles and their use on the public ways may not be used indirectly to control and regulate the business of the user. (7A Am Jur 2d §11) State regulations of motor vehicles engaged in transportation for hire which unreasonably interfere with or discriminate against interstate commerce are invalid. *Buck vs. Kuykendall*, 267 U.S. 307, 45 S. Ct. 324 When a state goes beyond the regulation of the manner of use of highways, and purports to determine the persons by whom an interstate highway may be used, its regulation may be attacked successfully on the ground of an imposition of a burden on interstate commerce. *George W. Bush & Sons Co. vs. Maloy*, 267 U.S. 317, 45 S.Ct. 324 By the act of Congress in adopting the Motor Carrier Act the power of the state over interstate motor carriers was greatly reduced. *Castle vs. Hayes Freight Lines, Inc.*, 348 U.S. 61, 75 S. Ct. 191.

A town ordinance that prohibited trucks in excess of a specified weight from using a certain portion of a street (in a residential district) that was the shortest route between a major industrial area and an expressway, and which had the effect of increasing the driving distance between the industrial area and the expressway by 3.3 miles my mandating the use of an alternate route, would be declared unconstitutional as unreasonably encroaching on the exercise of private property rights without any substantial relation to a legitimate governmental purpose ... *Peconic Avenue Businessmen's Association vs. Brookhaven* 469 NYS2d 483.

Massachusetts has deregulated the waste transport business so ordinary dump trucks and construction vehicles can cart construction debris, commercial waste and items prohibited by the Dalton Regulation. Waste transport is not limited to a special purpose, easily recognizable vehicle. The Regulation is unreasonably discriminatory in that only vehicles operated by BCI or some other organization known to be in the Waste Transport business are effectively prohibited from operating at night or in the early morning. The Dalton Regulation is unreasonable in its effect because it prevents BCI from operating 12 hours per day when its competition, that need not travel through a Dalton residential area, may operate. BCI traffic is only a small portion of the large truck traffic traveling down Park Avenue in Dalton. The majority of the large Park Avenue truck traffic consists of Dalton Town vehicles and Patricia Construction vehicles.

Municipal ordinances may not exceed the power conferred by enabling statutes *City of Boston v. A. W. Perry, Inc.* (1939) 22 N.E.2d 627, 304 Mass. 18; *Cawley v. Northern Waste Co.* (1921) 132 N.E. 365, 239 Mass. 540. M.G.L 111 §31A and 31B are the enabling statutes for transportation of garbage. Clearly, the Regulation exceeds the powers granted in the enabling statutes. There is

certainly no power conferred upon Dalton to regulate empty garbage trucks. This action against Robert J. Laffond should be dismissed.

Issues raised in the brief submitted to the Appeals Court of Massachusetts:

The right of a citizen to travel upon the public highways and to transport his property thereon ... is not a mere privilege which the municipality may permit or prohibit at will, but a common right which the citizen has under his right of life, liberty, and the pursuit of happiness. (7A Am Jur 2d §7) It is well settled that the use of highways and streets by vehicular or pedestrian traffic may be limited, controlled, and regulated by the responsible public authority in the exercise of the police power whenever, and to the extent necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people.... However, the power to regulate vehicles and their use on the public ways may not be used indirectly to control and regulate the business of the user. (7A Am Jur 2d §11)

1. The Town of Dalton does not have the authority to enact the Regulation?

The power of the Town to enact the Regulation is derived from the Home Rule Amendment (Const. Amend. Art. 2, §6) which points to enabling legislation. The enabling legislation is contained in M. G. L. c.111, §31B (supra) which is limited by M. G. L. c.111, §31A and restricts the Town's power to regulate empty trucks.

The intended effect and consequence of the Regulation is to restrict the hours of the day when garbage may be collected in areas zoned for business, commercial or industrial use contrary to the limitation on Town powers set forth in M. G. L. c.111, §31A.

The enabling legislation is concerned with garbage not the regulation of truck traffic within a Town. The Regulation goes beyond the authority of the enabling legislation by restricting **empty refuse vehicles** from being in any residential district between the hours of 7:00 p.m. and 7:00 a.m. on any day.

The meaning of the term "refuse vehicle" is very vague. Since the Commonwealth deregulated waste vehicles, any vehicle with a commercial license can haul refuse, though not every vehicle does. Even Town vehicles haul branches and waste from public works projects which cargo could fall within the general term of refuse. Does this forever classify these vehicles as "empty refuse vehicles" forever subject to the Regulation. Every pick-up truck or other truck that transports material to the Town Transfer Station would thereafter qualify as a refuse vehicle subject to the Regulation. The point is that there is no design characteristic or permit that would identify a particular vehicle as being an "empty refuse vehicle" subject to the Regulation. The result is the Regulation is only enforced against those such as BCI which is in the business of transporting refuse. This is discriminatory because similar vehicles with similar noise characteristics travel through Dalton Residential Districts and are not prohibited by the Regulation. This is because such vehicles are not generally regarded as "empty refuse vehicles" even though they have that capacity and may be used to transport rubbish.

2. The Regulation violates the Commerce Clause of Art. 1, §8 of the United States Constitution.

The Commerce Clause provides that "Congress shall have power to regulate commerce with foreign nations, and among the several states." In the case of the *City of Philadelphia v. New Jersey, et al* 437 U.S. 617 (1978) at page 622, the Supreme Court held that "All objects of

interstate commerce merit Commerce Clause protection ... we reject the state court's suggestion that the banning of "valueless" out-of-state wastes ... implicates no constitutional protection". This case overturned a New Jersey statute prohibiting importation of waste collected outside New Jersey. Therefore the garbage, refuse, recyclable materials, offal or other offensive substances carted by BCI deserves and is entitled to Commerce Clause protection.

What standard should be used in evaluating whether the Regulation violates the Commerce Clause? At one extreme, the case of *City of Philadelphia v. New Jersey, et al* (supra) pointed out at page 624 "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected". In a case of this type, the Supreme Court recently overturned a Massachusetts effort to protect the Commonwealth's troubled dairy industry. The Supreme Court observed that "Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects... In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce". *West Lynn Creamery et al v. Jonathatn Healy, Commissioner of the Department of Food and Agriculture* 114 S. Ct. 2205, 129 L Ed 2d 157 (June 1994) at page 172 of the Lawyers Edition.

The general contours of the standard to be applied on the case-by-case analysis of the purposes and effects the Regulation are referred to as the Pike Test that was first outlined by the Supreme Court in *Pike v. Bruce Church, Inc.* 397 U.S. 127 at Page 142 which is quoted below:

> Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The Regulation effectively limits the hours that BCI may operates and restricts BCI's ability to leave Dalton, travel out of state and collect refuse and recyclable materials for transportation to Massachusetts based recyclable material markets, incinerators and landfill locations.

The case of *Diamond Waste, Inc. v. Monroe County, GA.* 939 F.2d 941 (11th Circuit 1991) held that County's resolution governing transportation of refuse, which prohibited landfill operator from transporting waste from outside county and state, violated commerce clause, in that impact on interstate commerce could have been substantial and county could have achieved its objectives in a less burdensome manner" The 11th Circuit Court of Appeals observed in this case at page 946 "under the particular circumstances at issue, the fact that less restrictive alternatives are available to Monroe County makes the burden imposed by the absolute ban clearly excessive in relation to the local benefits created."

Refuse trucks traveling quickly through a neighborhood exude little odor other than the odor of Diesel Engine exhaust that is common to all trucks and similar

heavy equipment. The problem appears to be noise. The Town of Dalton could have established reasonable truck noise levels that would be applicable to all trucks not just to so called "refuse vehicles". Because an available less restrictive alternatives is not used by the Regulation, then the absolute ban on travel in a residential district between the hours of 7:00 p.m. and 7:00 a.m. on any day violates the Commerce Clause of the Constitution.

Issues raised in the request for rehearing submitted to the Appeals Court of Massachusetts:

Can the Town of Dalton shut down BCI's inter-state trucking business between 7:00 p.m. and 7:00 a.m. by enforcing a Health Regulation that restricts both refuse hauling trucks and empty trucks? The enabling statute, M. G. L. c.111, §31A, that gives Dalton the power to enact the Health Regulation has several serious limitations. It does not permit Towns to regulate motor carriers in the Commonwealth. It focuses on the regulation of garbage hauling and not on the regulation of the truck that does the hauling. It also prohibits Town enactment of any regulation that would "restrict the hours ... when garbage ... may be collected in areas zoned for business, commercial or industrial use". The Dalton Regulation prohibits BCI from conducting commercial or industrial garbage pick up after 7:00 p.m. or before 7:00 a.m. since BCI is locked behind a residential neighborhood with no direct highway access.

The Complaint charges the Defendant with transporting garbage through the Streets of Dalton without first obtaining a permit from the Board of Health in violation of G.L.C.111, §31A. There is nothing in the Agreed Statement of Facts that would support a conviction of the Defendant on the Charge set forth in the Complaint arising

out of the alleged September 22, 1993 offense. In fact, BCI (and the Defendant) have the required §31A permit (See attached copy). The Complaint, filed by the Prosecution in this case, has nothing to do with the Dalton Health Regulation and should clearly be dismissed for lack of evidence.

The Agreed Statement of Facts and the argument of both parties centers around the Dalton Health Regulation and the alleged offense of August 4, 1993. The original draft of the Agreed Statement of Facts did not contain the September 22, 1995 incident. (A copy is attached for your information) This incident was added later at the request of Dalton Town Counsel. Clearly, the wrong Complaint was filed in the Pittsfield District Court or the Prosecution failed to file the second Complaint involving the August 4, 1993 incident.

Issues raised in the Petition for Further Appellate Review to the Supreme Judicial Court of Massachusetts:

(1.) Does the Town of Dalton have the authority to enact the Regulation, restricting hours of Commercial refuse pickup and restricting hours of operation of empty and full refuse vehicles?

(2.) The Regulation violates the Commerce Clause of Art. 1, §8 of the United States Constitution. (Control of operational hours limits operational range and impacts interstate commerce and less restrictive means are available)

(3.) The wrong Complaint was filed in the Pittsfield District Court which is not supported by the evidence in this case.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Rule 10.1(c) which states, "When a state court ... has

decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

A fundamental due process requirement is that a defendant be given notice in a Complaint of the charges against him so he can prepare a defense. The Complaint in this case charges the Defendant with transporting garbage through the Streets of Dalton without first obtaining a permit from the Board of Health in violation of G.L.C.111, §31A. Nothing in the Agreed Statement of Facts support a conviction of the Defendant.

Dalton has shut down BCI's inter-state trucking business between 7:00 p.m. and 7:00 a.m. by enforcing a Health Regulation that restricts both refuse hauling trucks and empty trucks. The enabling statute, M. G. L. c.111, §31A, that gives Dalton the power to enact the Health Regulation has several serious limitations. It does not permit Towns to regulate motor carriers in the Commonwealth. It focuses on the regulation of garbage hauling and not on the regulation of the truck that does the hauling. It also prohibits Town enactment of any regulation that would "restrict the hours ... when garbage ... may be collected in areas zoned for business, commercial or industrial use". The Dalton Regulation prohibits BCI from conducting commercial or industrial garbage pick up after 7:00 p.m. or before 7:00 a.m. since BCI is locked behind a residential neighborhood with no direct highway access.

The Regulation violates decisions of this Court regarding the Commerce Clause of Art. 1, §8 of the United States Constitution. State regulations of motor vehicles engaged in transportation for hire which unreasonably interfere with or discriminate against interstate commerce are invalid. When a state goes beyond the regulation of the

manner of use of highways, and purports to determine the persons by whom an interstate highway may be used, its regulation may be attacked successfully on the ground of an imposition of a burden on interstate commerce.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that his Petition for Writ of Certiorari be branted.

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APPENDIX

APPENDIX

Opinion of Appeals Court A-2

Order of District Court A-8

Order of District Court
- Jury Session A-8

Appeals Court Order
- Rehearing Denied A-9

Supreme Judicial Court Order
- Further Review Denied A-10

Agreed Statement of Facts A-11

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT FOR THE COMMONWEALTH,

At Boston, September 29, 1995

In the case of

COMMONWEALTH

vs.

ROBERT LAFFOND.

pending in the Pittsfield District Court for the County of Berkshire

ORDERED, that the following entry be made in the docket; viz.,--

Judgment affirmed. . . .

By The Court,

/s/ Nancy Tuck Foley, Clerk

September 29, 1995

Over

94-P-1961 Appeals Court

COMMONWEALTH vs. ROBERT LAFFOND.

No. 94-P-1961. September 29, 1995.

Regulation. Board of Health. Constitutional Law, Commerce clause, Interstate commerce.

At issue is the validity of a regulation of the board of health of the Town of Dalton forbidding any person from hauling garbage in a residential district during certain hours. [1]

The defendant was convicted of a single violation of the regulation and received a fine of $200. Before the commencement of the bench trial in the jury session of the District Court, the defendant moved to dismiss the

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[1] General Laws c. 111, § 31A, empowers a board of health to grant permits, and § 31B authorizes the board to enact rules and regulations for the control of transportation of offensive substances. In 1993, the town board of health adopted a regulation which reads as follows:

"Effective August 1, 1993, no removal, transportation or disposal of garbage, refuse, recyclable materials, offal or other offensive substances, or empty refuse vehicles, shall be permitted in any residential district between the hours of 7:00 P.M. and 7:00 A.M., Monday through Sunday. Violation of this regulation will result in a fine of $1,000. Each offense will be deemed a separate violation. If any portion, sentence or clause is subsequently held to be invalid, the remainder of the regulation shall be in full force and effect."

complaint. The trial judge denied the motion and found that the defendant had violated the regulation. We affirm the judgment below.

The statement of agreed facts, which was adopted as findings of fact by the trial judge, recounts that on the morning of September 22, 1993, at 5:36 A.M., the defendant was observed by a Dalton police officer operating a truck bearing the name "Berkshire Cleanway" on its side. Seeing that the defendant was operating the vehicle, which contained a load of debris, on a residential street, the officer stopped the defendant and informed him that he was in violation of the regulation. On September 24, 1993, the chief of police, at the direction of the Dalton board of health, applied for a complaint for process to issue from the clerk of the District Court (see G. L. c. 276, § 22). A complaint subsequently issued, and it is challenged by the defendant in this appeal.

The statement of agreed facts notes two incidents when the police stopped the defendant's vehicle for violating the regulation. The first incident, for which no complaint issued, involved an empty garbage truck. The second incident, which as noted above, involved a vehicle containing debris, is at issue in the case at bar. Because the defendant was not prosecuted for operating an empty garbage truck during the prescribed time period, he does not have standing to attack the regulation as being beyond the purview of the enabling legislation or as being discriminatory in regard to empty vehicles. See Bane v. Boston, 8 Mass. App. Ct. 552, 556 n.7 (1979).

To the extent that the defendant attempts to raise discriminatory treatment in regard to vehicles containing

debris, that claim, raised in one sentence without citation to any authority, does not constitute appellate argument and, therefore, need not be considered by this court. Mass. R.A.P. 16(a) (4), as amended, 367 Mass. 921 (1975). Lolos v. Berlin 338 Mass. 10, 13-14 (1958). Hillis v. Lake, 38 Mass. App. Ct. 221, 223 (1995).

The defendant contends that the regulation violates the commerce clause of the United States Constitution, art. I, § 8, cl. 3. [2] He does not dispute that the board has a legitimate interest in regulating the transport of waste materials within the town or that the regulation is not even-handed or nondiscriminatory in its operation against out-of-State businesses. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1979); Grocery Mfrs. of Am., Inc. v. Department of Public Health, 379 Mass. 70, 80-81 (1979). Rather, the defendant argues that the regulation excessively burdens interstate commerce in relation to the asserted benefits. Pike v. Bruce Church, Inc., supra. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 442 (1978). There is no factual support for that contention.

---

[2] The defendant's memorandum in support of his motion to dismiss notes that Berkshire Clean-Way Rubbish Removal, Inc., transports wastes between the States of Massachusetts, New Hampshire, Vermont, Connecticut, and New York. The defendant does not have to cross a State line to invoke the protection of the commerce clause; any intrastate economic activities that affect interstate commerce fall within the ambit of the commerce clause. Wickard v. Filburn, 317 U.S. 111, 122-125 (1942). See also Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 277 (1981).

As the defendant would have it, the daylight time restrictions set out in the regulation prevent early morning collections of waste from Dalton for transport to distant landfill and incinerator sites which close in the early afternoon. He also claims that the limited hours burden emergency operations when municipal fire departments call upon his employer, Berkshire Clean-Way Rubbish Removal, Inc., to remove and transport burning materials to a safe disposal area. "The State's power to regulate commerce is the greatest when it regulated matters (like garbage collection) traditionally considered to be of local concern." Commonwealth v. B & W Transp., Inc., 388 Mass. 799, 807 (1983), and cases cited, appeal dismissed sub nom. Burke Distrib. Corp. v. Massachusetts, 464 U.S. 957 (1983).

Unlike the situation described in Diamond Waste, Inc. v. Monroe County, Ga, 939 F.2d 941, 946 (11th Cir. 1991), a case upon which the defendant relies, the regulation in the instant case does not prevent garbage, trash, or waste of any kind from being transported into the town from other locations. So long as a regulation is rationally related to a legitimate State goal, it will be upheld unless it unduly discriminates against interstate commerce, or the burdens imposed on interstate commerce outweigh the State's interest in enforcing the regulation. See Raymond Motor Transp., Inc. v. Rice, 434 U.S. at 442-443; Tribe, American Constitutional Law § 6-5 (2d ed. 1988).

The only possible burden on interstate commerce raised by the defendants is that removal operations may be delayed and are less convenient because of the time restrictions and the location of its current transfer station in a residential district. These inconveniences and burdens,

however, are not disproportionate when balanced against the Town's interest, the preservation of tranquility during hours when residents are likely to be at rest. See National Tank Truck Carriers, Inc. v. City of New York, 677 F.2d 270, 274 (2d Cir. 1982). On the record, there is no showing that the regulation in the case at bar is irrational.

Judgment affirmed.

Leslie R. Long for the defendant.
Joel B. Bard for the Commonwealth.

COMMONWEALTH OF MASSACHUSETTS

CENTRAL BERKSHIRE DISTRICT COURT

At Pittsfield, Massachusetts, June 2, 1994

In the case of
COMMONWEALTH vs. ROBERT LAFFOND.

Docket Number 9327 CR 2564:
Case submitted on stipulated Agreed Statement of Facts - Finding of Guilty before Judge Barbalunga on June 2, 1994.

COMMONWEALTH OF MASSACHUSETTS

CENTRAL BERKSHIRE DISTRICT COURT-JURY SESSION

At Pittsfield, Massachusetts, June 2, 1994

In the case of
COMMONWEALTH vs. ROBERT LAFFOND.

Jury Docket Number 9427 JC 0224:
Jury trial was waived by the Defendant. Case was submitted on stipulated Agreed Statement of Facts - Finding of Guilty before Judge Barbalunga on June 2, 1994. Notice of Appeal to Appeals Court of Massachusetts filed June 6, 1994

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

94-P-1961

COMMONWEALTH

vs.

ROBERT J. LAFFOND.

ORDER

The petition for rehearing filed by the appellant having been considered, it is ordered that the said petition be, and the same hereby is, denied.

By the Court (Dreben, Kass & Greenberg, JJ.),

Lena M. Wong

Assistant Clerk

Entered: October 26, 1995.

Supreme Judicial Court for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

..eslie R. Long, Esquire
26 North Sound Beach Ave.
Riverside, CT 06878

RE: Docket No. FAR-08133

COMMONWEALTH
vs.
ROBERT LAFFOND

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on November 27, 1995, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: November 27, 1995

To: Joel B. Bard, Esquire
Leslie R. Long, Esquire

AGREED STATEMENT OF FACTS

1. This matter concerns a Board of Health Regulation entitled *Transportation of Garbage on Public Ways* (hereinafter referred to as "the Regulation"). The regulation provides:

> Effective August 1, 1993, no removal, transportation or disposal of garbage, refuse, recyclable materials, vehicles, shall be permitted in any residential district between the hours of 7:00 p.m. and 7:00 a.m., Monday through Sunday. Violation of this regulation will result in a fine of $1,000. Each offense will be deemed a separate violation. If any portion, sentence or clause is subsequently held to be invalid, the remainder of the regulation shall be in full force and effect.
>
> /s/ Board of Health, Vivian I. Mason, John W. Bartels, Sr., and Paul C. Carter.

The regulation was adopted pursuant to the provisions of M.G.L. c.111, §31B "in order to limit noise and odor and provide peace of mind within the residential zoning district of the Town of Dalton."

The regulation became effective on July 16, 1993 in accordance with the provisions of MGL c. 111, §31.

2. On August 4, 1993, Dalton Police Officer Rene J. Bonneau observed a truck with the name Berkshire Cleanway on the side travelling on a residential street, specifically Park Avenue, in Dalton, at 5:19 a.m. in the morning. A picture of the truck is attached as Exhibit A.

3. Officer Bonneau observed that the truck cab was brown, and the attached trailer contained two bins, one

painted green and the other brown.

4. Officer Bonneau stopped the vehicle and informed the driver that he was in violation of the Regulation.

5. The driver identified himself to Officer Bonneau as Robert J. Laffond.

6. Robert J. Laffond presented Officer Bonneau with a commercial registration for the truck and for its trailer that indicated that Berkshire Cleanway Rubbish Removal, Inc. (BCI) was the owner of the vehicle. Mr. Laffond stated to Officer Bonneau that BCI was the owner of the vehicle. Officer Bonneau recorded Mr. Laffond's driver's license number and the two registration numbers for the commercial cab and trailer.

7. BCI engaged in the interstate trucking of waste and recyclable materials. BCI has a single place of business; consisting of an office, garage and recycling facilities located at 10 Park Avenue (also known as Bridle Path Road) in the Town of Dalton, Berkshire County, Commonwealth of Massachusetts with a zip code of 01226. In addition, BCI has parked up to two trucks, without containers, at Freadman Steel, in Pittsfield, Massachusetts.

8. On September 22, 1993, Officer Bonneau stopped Mr. Laffond at 5:36 a.m. on Park Avenue Extension, in Dalton, while driving the same vehicle shown in Exhibit A. The truck contained construction and demolition debris. The parties agree that the Dalton police report dated 9/23/93 pm case 93-09-1282 be attached. Any facts in the police report that are inconsistent with the facts herein are not accepted. Allegations in para. 3 and 4 of the police report regarding BCI intentions to violate the Regulation are not agreed to by Mr. Laffond.

9. The location of BCI is shown on the Regional Locus Map, drawn by Hill Engineers, Architects, Planners and attached as Exhibit B. The only approach to or exit from

the BCI place of business is over High Street or Park Avenue Extension, both of which are residential streets in the Town of Dalton.

10. The truck driven by Mr. Laffond at the time he was stopped by Officer Bonneau had been parked the evening before at the BCI place of business at 10 Park Avenue Extension in the Town of Dalton. Mr. Laffond was leaving the BCI garage at the time he was stopped by Officer Bonneau.

11. Officer Bonneau prepared a report of the incident and forwarded the report to the Chief of Police. Sergeant Lawrence Higgins, Acting Chief of Police, forwarded the incident report of the violation of the Regulation to the Town of Dalton Board of Health.

12. On September 24, 1993, Police Chief Daniel Filiault, at the direction of the Town of Dalton Board of Health, filed an application for a Complaint to issue against Mr. Laffond for violation of the Regulation.

13. On October 28, 1993, a hearing was held in the Pittsfield District Court on the Town of Dalton's application for a Complaint. The driver, by and through his attorney, moved to dismiss the matter.

14. On March 17, 1994, at a pre-trial conference, the Court (Barbalunga, J.) allowed defendant to resubmit his Motion to Dismiss and set a hearing on that Motion to Dismiss for May 6, 1994 at 9:00 a.m. at the Pittsfield District Court. The parties agreed at the pre-trial conference that the matter probably could be submitted on an Agreed Statement of Facts. On May 6, 1994, the Court ordered the parties to file any memoranda by May 27, 1994 and scheduled the matter for disposition on June 2, 1994.

/s/ Leslie R. Long, Esq.

Dated: May 26, 1994

/s/ Joel B. Bard, Esq.

Supreme Court, U.S.
FILED
JUN 10 1996
CLERK

No. 95-1825

In The

Supreme Court of the United States

October Term, 1995

ROBERT J. LAFFOND,

Petitioner,

vs.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

1. Whether the Massachusetts Appeals Court properly followed precedent in holding that the Town of Dalton's Board of Health Regulation was constitutional and did not violate the Commerce Clause, because the Regulation was reasonably related to the legitimate local interest of public health, nondiscriminatory against out-of-state commerce, not an undue restraint upon interstate commerce, and not preempted by federal law.

2. Whether the validity, under Massachusetts law, of a Town Board of Health Regulation raises an important question of federal law.

LIST OF INTERESTED PARTIES

The Petitioner is Robert J. Laffond, who is a truck driver for Berkshire Cleanway Rubbish Removal, Inc. ("BCI").

The Respondent is correctly identified as the Commonwealth of Massachusetts as this case arises out of a complaint filed by the Commonwealth for a violation of a Board of Health Regulation of the Town of Dalton, Massachusetts (the "Town"). Because this matter involves a challenge to the Town's Regulation, Dalton's Town Counsel, Joel B. Bard of Kopelman and Paige, P.C. has represented the Commonwealth throughout these proceedings.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Statutory Provisions Involved	1
Statement of the Case	1
A. Procedural History	1
B. The Record Below	2
Reasons for Denying the Writ	4
I. The Massachusetts Appeals Court properly followed precedent and held that the Town of Dalton's Board of Health Regulation was constitutional and did not violate the Commerce Clause, because it was reasonably related to the legitimate local interest of public health, nondiscriminatory against out-of-state commerce, not an undue restraint upon interstate commerce, and not preempted by federal law. . .	4
A. The Regulation is nondiscriminatory and is reasonably related to a legitimate local interest.	6

Contents

Page

B. Because the Regulation does not impose an undue restraint upon interstate commerce, it does not violate the Commerce Clause. ... 7

C. The Regulation is not preempted by federal laws. ... 8

II. The validity, under Massachusetts law, of a town board of health regulation does not raise a question of federal law. ... 9

Conclusion ... 13

TABLE OF CITATIONS

Cases Cited:

Baker v. City of Boston, 29 Mass. 183 (1831) ... 12

Bloom v. Worcester, 363 Mass. 136 (1973) ... 10, 11

City of Malden v. Flynn, 318 Mass. 276 (1945) ... 11

Comm. v. Houtenbrink, 235 Mass. 320 (1920) ... 12

Commonwealth v. B&W Transportation, Inc., 388 Mass. 799 (1983) ... 5

Diamond Waste, Inc. v. Monroe County, GA., 939 F.2d 941 (11th Cir. 1991) ... 7

Contents

	Page
Evergreen Waste Systems, Inc. v. Metropolitan Service Dist., 820 F.2d 1482 (1987)	7
Grocery Mfgrs. of America v. Dept. of Pub. Health, 379 Mass. 70 (1979)	6
Henry v. State of Mississippi, 379 U.S. 443, 85 S. Ct. 564 (1965)	13
Hughes v. Oklahoma, 441 U.S. 322 (1979)	5
Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1959)	5
Linmark Associates, Inc. v. Willingboro, 535 F.2d 786 (1976)	10
Lomberto v. Franklin, 27 Mass. App. Ct. 797 (1989)	10
Nat. Tank Truck Carriers v. City of New York, 677 F.2d 270 (2nd Cir. 1982)	4, 8
Philadelphia v. New Jersey, 437 U.S. 617 (1978)	5, 6
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	4, 5, 7
Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945)	9
Take Five Vending, Ltd. v. Provincetown, 415 Mass. 741 (1993)	11

Contents

Page

Town of Wendell v. Attorney General, 394 Mass. 518 (1985) 10

West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994) 6

Statutes Cited:

Mass. Gen. L. ch. 111, § 31 ..... 1, 9

Mass. Gen. L. ch. 111, § 31A 1, 7, 9, 11, 12

Mass. Gen. L. ch. 111, § 31B 1, 3, 9, 10, 11

United States Constitution Cited:

Art. I, § 8 cl. 3 ..... 2, 4

APPENDIX

Appendix A — Police Report 1a

Appendix B — Statutes Involved 6a

STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions, statutes and municipal by-laws referenced by Petitioner, the Respondent relies on the following provisions of the Massachusetts General Laws, which have been included in the Appendix hereto:

Mass. Gen. L. ch. 111, § 31

Mass. Gen. L. ch. 111, § 31A

Mass. Gen. L. ch. 111, § 31B

STATEMENT OF THE CASE

A. Procedural History

On September 24, 1993, the Town of Dalton Police Chief filed an application for a Complaint in Pittsfield District Court to issue against Petitioner Laffond for two violations of a Town of Dalton Board of Health Regulation (the "Regulation"). At the October 28, 1993, District Court hearing on the Police Chief's application for a Complaint, Petitioner filed a Motion to Dismiss the Complaint, challenging the Regulation's constitutionality.

On March 17, 1994, at a pre-trial conference, the District Court (Barbalunga, J.) ordered that the parties prepare an Agreed Statement of Facts and requested that the parties file memoranda on Petitioner's motion to dismiss. At a hearing on June 2, 1994, the District Court denied Petitioner's motion to dismiss and found Petitioner guilty of violating the Regulation. Petitioner was fined $200, payment of which was stayed. Petitioner filed a notice of appeal with the Massachusetts Appeals Court on June 6, 1994.

On September 29, 1995, the Appeals Court issued a written decision in which it affirmed the District Court's judgment. The Appeals Court found that the Town's Regulation did not violate the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, because any inconveniences and burdens were not disproportionate when balanced against the Town's interest, namely the preservation of tranquility during hours when residents are likely to be at rest in their homes. The Appeals Court further held that the Town's regulation was not irrational.

Petitioner filed a Petition for Rehearing with the Appeals Court which the Appeals Court denied on October 26, 1995. On November 27, 1995, the Massachusetts Supreme Judicial Court denied Petitioner's Application for Further Appellate Review.

B. The Record Below

In his zeal to build a case for review by this Court, Petitioner has added facts not on the record and a claim not raised below. The additional facts concern extraneous details of BCI's (Petitioner's employer) waste-hauling operations. The additional claim is one for violation of Petitioner's due process rights. Petitioner attempts to introduce numerous facts that are not in the record. The Petition's "Background" section on pages 5 and 6, except for the last full paragraph on page 6, is not supported by any documents or evidence in this case. Petitioner has also added unfounded statements regarding Town officials' hostility to BCI. None of these "facts" (which are, in any event, irrelevant) should be considered by this Court.

In addition, as he unsuccessfully attempted to do in his Application for Further Appellate Review to the Massachusetts Supreme Judicial Court, Petitioner attempts to raise an issue which cannot be reached by this Court because it was not raised below. Petitioner now claims, at 18, that his due process rights

were violated because he was not given notice "of the charges against him so he can prepare a defense." Petitioner appears to be attempting to argue, at 16-17, that the form of the complaint did not put him on notice that the charge against him was that he was violating the Town's regulation. The record clearly shows that Petitioner knew what the issues were and that he was able to prepare a defense.

Petitioner's knowledge of the violation and the issues it raised is first evidenced by the Motion to Dismiss that he filed in Pittsfield District Court. Petitioner moved to dismiss the Town's complaint on the grounds that the Dalton Board of Health Regulation was unconstitutional, violated the Commerce Clause and was preempted by state law, among other reasons. It is clear from his Motion that Petitioner understood the violation with which he had been charged and the issues that he needed to address in his defense.

The Agreed Statement of Facts, developed jointly by Petitioner and the Town in order to present the issues to the trial court, also demonstrates Petitioner's awareness of the violation. Paragraph 1 of the Agreed Statement clearly states that "[t]his matter concerns a Board of Health Regulation entitled Transportation of Garbage on Public Ways . . . adopted pursuant to the provisions of M.G.L. c. 111, § 31B." The police report dated September 23, 1993, incorporated into the Agreed Statement of Facts by paragraph 8, explicitly states that Petitioner was "in violation of the regulation . . . which stated that such vehicles were only allowed in residential areas between 7:00 A.M and 7:00 P.M." (This police report has been omitted from both Petitioner's Petition and Appendix but has been reproduced in Respondent's Appendix).

Lastly, Petitioner's Brief to the Massachusetts Appeals Court further shows that Petitioner understood the issues raised

by the Town's complaint. In that Brief, Petitioner challenged the authority of the Town to enact the Regulation and claimed that the Regulation violates the Commerce Clause. Accordingly, Petitioner cannot now be allowed to manufacture a federal due process claim that a "wrong complaint" was filed and that he did not have notice of the charges against him.

REASONS FOR DENYING THE WRIT

I.

THE MASSACHUSETTS APPEALS COURT PROPERLY FOLLOWED PRECEDENT AND HELD THAT THE TOWN OF DALTON'S BOARD OF HEALTH REGULATION WAS CONSTITUTIONAL AND DID NOT VIOLATE THE COMMERCE CLAUSE, BECAUSE IT WAS REASONABLY RELATED TO THE LEGITIMATE LOCAL INTEREST OF PUBLIC HEALTH, NON-DISCRIMINATORY AGAINST OUT-OF-STATE COMMERCE, NOT AN UNDUE RESTRAINT UPON INTERSTATE COMMERCE, AND NOT PREEMPTED BY FEDERAL LAW.

The Appeals Court properly held that the Town's Regulation did not violate the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3. The Court noted that the facts in the record did not support Petitioner's claim that the regulation excessively burdens interstate commerce in relation to the asserted benefits. The court properly followed precedent with regard to interpretation of the Commerce Clause and concluded that any burdens and inconveniences were not disproportionate when balanced against the Town's interest in the preservation of tranquility during hours when residents were likely to be resting. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Nat. Tank Truck Carriers v. City of New York*, 677 F.2d 270, 274 (2nd Cir. 1982).

The Appeals Court, in finding that the Regulation did not violate the Commerce Clause, correctly applied the Supreme Court's test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under the *Pike* test, where a state statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the local benefits. *Id.* In this case, the exercise of the Town's police power serves a legitimate local interest, namely the health of the residents of the Town. *Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1959); *Commonwealth v. B & W Transportation, Inc.*, 388 Mass. 799 (1983). Because it is even-handed in its operation, *i.e.*, nondiscriminatory, and the burden imposed on interstate commerce is not "clearly excessive in relation to the putative local benefits," the Regulation is presumed valid. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Hughes v. Oklahoma,* 441 U.S. 322 (1979). Finally, the regulated activity is not one which requires uniformity of treatment, and thus it may be regulated on the local level.

The Regulation could have some indirect effect on BCI's activities in that it limits the hours during which BCI trucks may travel on residential streets in Dalton. Petitioner would have the Court conclude from this fact that the Regulation is a violation of Petitioner's interstate commerce rights. This simple equation does not, however, demonstrate a violation of constitutionally protected rights. If these facts create a violation of interstate commerce protection, then any local zoning regulation prohibiting business or commercial uses in certain parts of a municipality could be vulnerable to the same challenge. The case law interpreting the United States Constitution's Commerce Clause does not support Petitioner's argument. The Regulation is neither preempted by, nor in violation of, federal interstate commerce laws.

A. The Regulation is nondiscriminatory and is reasonably related to a legitimate local interest.

The Regulation is even-handed and nondiscriminatory, therefore it is not *per se* invalid. The Regulation does not discriminate between in-state and out-of-state businesses. *Grocery Mfgrs. of America v. Dept. of Pub. Health,* 379 Mass. 70, 80 (1979). Because the Regulation applies to all similarly situated commercial waste transportation vehicles which travel through town, whether based locally or out-of-state and whether involved in purely local or interstate commerce, the Regulation cannot be said to discriminate against interstate commerce in violation of the Commerce Clause. All waste transportation companies, regardless of their location, are similarly affected by this Regulation. They must not use streets in residential areas from 7:00 p.m. to 7:00 a.m. The Town's Regulation does not effectuate economic protectionism. *West Lynn Creamery, Inc. v. Healy,* 114 S. Ct. 2205, 2217 (1994) (unconstitutional to preserve local industry by protecting it against interstate competition). Nor does the Regulation, in its practical operation, work discrimination against interstate commerce. *Philadelphia v. New Jersey,* 437 U.S. 617, 627 (1978) (statute prohibiting any importation of out-of-state waste was discriminatory and *per se* invalid).

The Town of Dalton seeks to protect the public health and well-being by prohibiting all commercial waste traffic in residential areas during those hours when residents are trying to relax at their homes and sleep, *i.e.*, from 7:00 p.m. to 7:00 a.m. As stated by the Board of Health, the Regulation was adopted "in order to limit noise and odor and provide peace of mind within the residential zoning districts of the Town of Dalton." These are legitimate local interests that the Board seeks to advance through its police powers. In order to accomplish these purposes, the Regulation applies to refuse vehicles whether the truck bins are

filled or empty, whether engaged in in-state or out-of-state travel, as they all create significant noise and nuisance.

B. Because the Regulation does not impose an undue restraint upon interstate commerce, it does not violate the Commerce Clause.

Because the Regulation serves a legitimate local interest and furthers this interest by a means with the least restrictive impact on interstate activities, it does not violate the Commerce Clause. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (balancing test applied in cases involving nondiscriminatory regulations that incidentally affect interstate commerce while serving local interests); *Evergreen Waste Systems, Inc. v. Metropolitan Service Dist.*, 820 F.2d 1482 (1987). Members of the public have a significant right to be free of the noise, odor and disruption of waste-hauling traffic on residential streets during their resting and sleeping hours. The Regulation is the least restrictive means that the Town of Dalton Board of Health could use under G.L. c. 111, §§ 31A, 31B to further this interest. The Town has balanced the public rights and interests with the needs of businesses which operate in the Town, regardless of where they are located, and has effected a compromise by means of the Regulation. The Town is not banning refuse vehicles from all of its streets. *Diamond Waste, Inc. v. Monroe County, GA.*, 939 F.2d 941 (11th Cir. 1991) (absolute ban on out-of-county and out-of-state wastes held to be unconstitutional). Nor is the Town singling out out-of-state vehicles; any refuse vehicle may travel on any non-residential street twenty-four hours a day. Nor is the Town permanently excluding vehicles from residential streets; refuse vehicles may use these streets for twelve hours each day.

The Regulation is, no doubt, an inconvenience, and perhaps even an expense, for refuse companies who must make adjustments so as to avoid residential streets for the small

number of their vehicles traveling outside of normal business hours. The Regulation may also delay the movement of some wastes in interstate commerce by limiting the operation of some refuse vehicles which must use residential streets between the hours of 7:00 p.m. to 7:00 a.m.. These inconveniences and burdens, however, are not disproportionate when balanced against the public interest in peace and quiet in residential areas during resting and sleeping hours. The Second Circuit Court of Appeals has held that, even though a city's regulations might burden interstate commerce by making trucks travel more miles to circumvent the city or by slowing the movement of goods in interstate commerce, these "inconveniences" were not unconstitutionally disproportionate under the Commerce Clause when balanced against public interest. *Nat. Tank Truck Carriers v. City of New York*, 677 F.2d 270, 274 (2nd Cir. 1982) (city's restrictions on the hours when trucks carrying hazardous gases could use city streets did not violate the Commerce Clause). Certainly, the minor inconvenience and possible expense created by the Regulation is not enough to invalidate the Regulation.

C. The Regulation is not preempted by federal laws.

The Regulation is not inconsistent with nor repugnant to federal interstate commerce laws, and is, therefore, not preempted by them. The regulation of traffic on local residential streets cannot require federal jurisdiction. There is no question that the regulation of traffic on local streets, like the regulation of local uses through zoning, is well within the jurisdiction of a municipality. This type of activity is, therefore, not one which requires federal regulation.

The requirement of uniformity of treatment usually becomes important when the proposed regulation is so out-of-proportion to the local interest sought to be protected that to

disrupt the flow of commerce for the stated local interest is unreasonable. *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945). The interest of public health sought to be advanced by prohibiting travel by refuse vehicles through residential streets during evening and sleeping hours is not unreasonable, nor is the public health interest disproportionate to the effect on the businesses of the limitation of hours. It is not a blanket prohibition against such refuse vehicles travelling through the residential areas, as these vehicles are permitted to travel through the residential areas in question for twelve hours of each day, notably the typical business hours of each day. In the present case, therefore, uniformity is not a requirement which would preclude such a regulation.

As it cannot be shown that the Regulation violates any constitutional protection or federal law, the Petition for a Writ of Certiorari should be denied.

II.

THE VALIDITY, UNDER MASSACHUSETTS LAW, OF A TOWN BOARD OF HEALTH REGULATION DOES NOT RAISE A QUESTION OF FEDERAL LAW.

The Massachusetts Appeals Court decision affirming the validity of the Town's Regulation disposed of the federal and state issues raised by Petitioner in his challenge. The Petition seeks, inappropriately, to have the United States Supreme Court also consider that portion of the judgment made by the state court on substantive state issues.

The Dalton Board of Health had adopted a regulation promulgated under the authority of Massachusetts General Laws Chapter 111, §§ 31, 31A and 31B. These sections empower a board of health to grant permits and authorize the board to enact

rules and regulations for the control of transportation of offensive substances. The Appeals Court's decision affirming the Regulation is in line with the established principle that a local board of health has the authority to make reasonable health regulations that are consistent with state law. *Town of Wendell v. Attorney General,* 394 Mass. 518, 529-530 (1985); *Bloom v. Worcester,* 363 Mass. 136, 145, 149 (1973); *Lomberto v. Franklin,* 27 Mass. App. Ct. 797 (1989).

A municipal ordinance duly enacted under ample grant of power is presumptively constitutional and binding. *Linmark Associates, Inc. v. Willingboro,* 535 F.2d 786 (1976). The municipal regulation in question was enacted pursuant to a presumptively valid Massachusetts statute specifically authorizing such regulations. A local board of health has the authority to make reasonable health regulations, as long as such regulations are consistent with state law. *Town of Wendell v. Attorney General,* 394 Mass. 518, 529-530 (1985). The Town's Regulation does not regulate beyond the requirements of that statute and is not inconsistent with the statute. It should, therefore, be presumed valid.

Clearly, the Regulation is not preempted by state law, because it precisely meets requirements of Mass. Gen. L. ch. 111, § 31B, enacted to regulate this exact type of commercial activity. The Massachusetts Supreme Judicial Court, in interpreting the scope of a municipality's home rule power, has stated that "communities may enact legislation to advance the common good so long as it is not inconsistent with State law." *Lomberto v. Franklin,* 27 Mass. App. Ct. 797 (1989), citing *Bloom v. Worcester,* 363 Mass. 136, 145, 149 (1973). As the Regulation is not inconsistent with nor repugnant to these state laws, it is not preempted by them. The Regulation, therefore, is constitutional and should be upheld.

The Town's regulation of empty refuse truck traffic on residential streets is not inconsistent with Mass. Gen. L. ch. 111, §§ 31A, 31B. In determining whether a regulation is inconsistent, courts have given municipalities "considerable latitude," as stated by the Massachusetts Supreme Judicial Court in *Bloom v. Worcester,* 363 Mass. 136 (1973):

> As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid.

Id. at 154. Such a conflict appears when "either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved" in the face of the local regulation. *Take Five Vending, Ltd. v. Provincetown,* 415 Mass. 741, 744 (1993).

Petitioner, at 13, would have this Court believe that the term "refuse vehicle" is vague, and Petitioner incorrectly states that "[e]very pick-up truck or other truck that transports material to the Town Transfer Station would thereafter qualify as 'empty refuse vehicles' forever subject to the Regulation." This is not the case. The provisions of Mass. Gen. L. ch. 111, § 31A limit the scope of the Board's regulation to persons who have obtained a permit from or registered with the Board to "remove or transport garbage, offal or other offensive substances through the streets" of the Town. *City of Malden v. Flynn,* 318 Mass. 276 (1945) (power of board of health determined by reading § 31B in conjunction with § 31A). As a consequence, the Town's use of the term "empty refuse vehicles" is not vague and is readily enforceable. Empty refuse vehicles are vehicles owned or

operated by a person permitted or registered under Mass. Gen. L. ch. 111, § 31A which are empty at the particular moment that they use the streets.

Petitioner argues, at 13, that the Regulation is discriminatory in its application because refuse haulers cannot readily be identified, stating that "any vehicle with a commercial license can haul waste, though not every vehicle does." This is unfounded, because a simple means of identifying actual waste haulers from trucks that merely appear capable of transporting refuse is implicit in the Regulation. A driver of a vehicle capable of hauling waste is asked for identification in the form of a waste hauler's permit required under Mass. Gen. L. ch. 111, § 31A.

The Supreme Judicial Court has held that whatever rationally tends to the promotion and preservation of the public health is within the police power of the state. *Comm. v. Houtenbrink*, 235 Mass. 320 (1920). Moreover, the court has held that a "municipal corporation has the right to remove nuisances which may endanger the health of its citizens, and its decision as to the manner in which it shall be done is conclusive, unless it transcends the powers conferred by the charter or violates the constitution." *Baker v. City of Boston*, 29 Mass. 183, 193 (1831). The Town's regulation of empty trucks as well as filled trucks does not sharply conflict with the state statute's protection of residential neighborhoods from the nuisances of truck traffic.

It is clear that the Massachusetts Appeals Court acted properly in affirming the validity, under Massachusetts law, of the Town's Regulation. Petitioner attempts to present several questions to this Court as to the validity of the Regulation under Massachusetts law. Although Petitioner raises these questions, he has not even attempted to argue that they have federal implications. By definition, this topic does not raise *any*

questions of federal law, let alone an important question of federal law. Petitioner's effort to have this Court examine the Town's authority under state law to enact the Regulation should be rejected as this is an issue of pure state law.

It is a fundamental principle that the United States Supreme Court's review is limited to federal issues. "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions." *Henry v. State of Mississippi*, 379 U.S. 443, 446, 85 S. Ct. 564, 566 (1965). This long-standing principle applies here where Petitioner is attempting to have this Court review a decision of the Massachusetts Appeals Court on questions of substantive state law.

CONCLUSION

The Massachusetts Appeals Court correctly found that the Regulation does not violate the United States Constitution. Petitioner's other claims raise purely local issues and do not implicate any federal questions. Accordingly, the Petition seeking a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — POLICE REPORT

DALTON POLICE DEPARTMENT

REPORT TO CHIEF

Originator: RENE' J. BONNEAU
Domestic Violence?: no
Subject: TRANSPORTATION OF GARBAGE

Report #: 2347
Date: 09/22/93

CHIEF FILIAULT:

(1) ON WEDNESDAY SEPTEMBER 22, 1993 AT 05:36 HRS., I OBSERVED A BERSHIRE CLEANWAY RUBBISH TRUCK (GARBAGE) ON A RESIDENTIAL STREET. (EXITING OFF OF PARK AVENUE). THE HAULER WAS STOPPED AT THE INTERSECTION OF MAIN STREET AND SOUTH STREET. THE DRIVER WAS I.D. ED TO BE ROBERT J. LAFFOND DATE OF BIRTH OF AUGUST 08, 1941, SOCIAL SECURITY NUMBER OF 003-288-945, LICENSE NUMBER OF MA. 033-288-945. REGISTRATION OF MA. COMM. 824135, WITH A TRAILER MA. REGISTRATION OF 68220. THE OWNER OF THE VEHICLE IS BERKSHIRE CLEANWAY RUBBISH REMOVAL INC. P.O.B. 253 DALTON MA. 01226. THE DESCRIPTION OF THE VEHICLE WAS BROWN IN COLOR CAB, WITH A GREEN BIN ON THE BACK TRAILER. THE VEHICLE WAS A DOUBLE TRAILER TYPE, WITH A GREEN BIN TO THE REAR OF THE FIRST GREEN BIN. THE VEHICLE PULLING BOTH BINS WERE FULL WITH WHAT THE DRIVER CALLED "DEMOLITION" (WOOD, PRESS BOARD, SHEETROCK ETC).

(2) THE DRIVER STATED THE FOLLOWING TO ME. THE COMPANY LAWYER WILL BE TAKING THE DALTON

OF DALTON TO COURT. THE LAWYER STATED TO THE DRIVER TO CONTINUE TO LEAVE FROM THE PARK AVENUE DEPOT STATION. THE DRIVER, MR. LAFFOND ALSO STATED HE WILL BE LEAVING AT 05.00 HRS., EVERY MORNING, WITH THE SAME TYPE OF TRUCK AND WITH THE SAME TWO BINS TO THE REAR. THE DRIVER STATED HE WAS GOING TO THE TOWN OF LEE. HE STATED THEY HAVE A CONTRACT WITH THE TOWN OF LEE TO PUT NON BURNABLE RUBBISH BECAUSE THEY ARE IN THE MIDDLE OF CAPPING THE TOWN LANDFILL. BUT BEFORE IT CAN BE CAPPED, THE LANDFILL HAS TO BE FILLED.

(3) THE DRIVER STATED AGAIN TO ME, WE WOULD BE SEEING THIS TRUCK ON RESIDENTIAL STREET UNTIL THEY RECEIVE DOCUMENTATION OF THE TOWN BY-LAW (CITATION OR FINE FROM THE BOARD OF HEALTH). WHERE IT WOULD BE TURNED OVER TO THE LAWYER WHO IS HANDLING THE CASE.

RESPECTFUL SUBMITTED;

RENE' J. BONNEAU
PATROLMAN DALTON POLICE DEPT.

Appendix A

DALTON POLICE DEPARTMENT

OFFENSE REPORT Case #: 93-09-1282

Offense Type: c

—Complainant—

Name-Last: TOWN OF DALTON First: Mid:
Street: 462 MAIN STREET]
City: Dalton State: MA Zip: 01226-
Phone:

—Report—

Received: Time: Date Rec.: 09/23/93

—Time and Place—

Offense Time: Date: 09/22/93 Place: PARK AVENUE
Domestic Violence: no

—Investigation—

Officer Assigned:
Investigation Time: Date:

Report By: CHIEF D. FILIAULT Date: 09/23/93

Appendix A

—Offense List—

—Suspect List—

Last: LAFFOND First: ROBERT Middle: J.
Street: 10 PARK TERRACE City: DALTON State: MA
Zip: 01226-
Date of Birth: 09/08/41 SSN: 003-28-8945

Offense Report Additional Text

1) On July 12, 1993 the Dalton Board of Health passed a regulation concerning the transportation of garbage in residential areas. The regulation went into effect August 1, 1993. All carriers of garbage licensed with the Town were notified of this regulation in writing by the Board of Health.

2) On August 4, 1993, Officer Rene' Bonneau stopped a vehicle owned by Berkshire Cleanway Inc. of Dalton. At the time (5:36am) the vehicle was being operated on a residential street (Park Ave.) in violation of the regulation (copy attached) which stated that such vehicles were only allowed in residential areas between 7:00am and 7:00pm.

3) At the time of the stop the vehicles container was empty, the operator Robert Laffond was asked if he was aware of the Board of Health regulation to which he stated he was. He further indicated that the company BCI had decided to violate the regulation so that the could contest the regulation in court. Mr. Laffond was sent on his way and he was informed that a report would be made to the Board of Health regarding the violation. A copy of that report is attached.

Appendix A

4) On September 22, 1993 at 5:36am, Officer Bonneau again stopped a BCI vehicle on Park Ave. in Dalton. This vehicle had a full load of garbage on it. The operator was again Robert Laffond who stated that he intended to continue to violate the regulation to force the Town to take further action against BCI.

5) On Thursday September 23, 1993 I spoke with Paul Carter a member of the Town of Daltons Board of Selectmen and Board of Health. He was informed of the second violation and he stated he would contact me on what action he felt the Town should take. He contacted me later in the morning and stated that the Board of Health wanted to take action on the violation of the regulation.

6) For that reason I would request that the operator of the vehicle be charged for violation of a Board of Health regulation set up under MCL Chapter 111 sec. 31A.

Respectfully submitted,

s/ Daniel D. Filiault
Chief Daniel D. Filiault

APPENDIX B — STATUTES INVOLVED

Mass. Gen. L. ch. 111, § 31

§ 31. Health Regulations; Notice.

Boards of health may make reasonable health regulations. A summary which shall describe the substance of any regulation made by a board of health under this chapter shall be published once in a newspaper of general circulation in the city or town, and such publication shall be notice to all persons. No regulation or amendment thereto which relates to the minimum requirements for subsurface disposal of sanitary sewage as provided by the state environmental code shall be adopted until such time as the board of health shall hold a public hearing thereon, notice of the time, place and subject matter of which, sufficient for identification, shall be given by publishing in a newspaper of general circulation in the city or town once in each or two successive weeks, the first publication to be not less than fourteen days prior to the date set for such hearing, or if there is no such newspaper in such city or town, then by posting notice in a conspicuous place in the city or town hall for a period of not less than fourteen days prior to the date set for such hearing. Prior to the adoption of any such regulation or amendment which exceeds the minimum requirements for subsurface disposal of sanitary sewage as provided by the state environmental code, a board of health shall state at said public hearing the local conditions which exist or reasons for exceeding such minimum requirements. Whoever, himself or by his servant or agent, or as the servant or agent of any other person or any firm or corporation, violates any reasonable health regulation, made under authority of this section, for which no penalty by way of fine or imprisonment, or both, is provided by law, shall be punished by a fine of not more than one thousand dollars.

Appendix B

Boards of health shall file with the department of environmental protection, attested copies of sanitary codes, and all rules, regulations and standards which have been adopted, and any amendments and additions thereto, for the maintenance of a central register pursuant to section eight of chapter twenty-one A.

Mass. Gen. L. ch. 111, § 31A

§ 31A. Permit for Removal and Transportation of Garbage.

No person shall remove or transport garbage, offal or other offensive substances through the streets of any city or town without first obtaining a permit from the board of health of such city or town; provided, however, that no rules or regulations shall restrict the hours of the day when garbage, offal or other offensive substances may be collected in areas zoned for business, commercial or industrial use. An application for such permit shall be in such form and contain such information, on oath, as such board shall require. All such permits shall expire at the end of the calendar year in which they are issued, but may be renewed annually on application as herein provided. No permit shall be transferred except with the approval of the said board.

Notwithstanding the foregoing provisions, any person may, without such a permit, transport garbage, offal or other offensive substances through the streets of a city or town in which said substances were not collected; provided, that he registers with the board of health of such city or town; and, provided further, that he transports said substances in accordance with such reasonable rules and regulations as may be established by such board of health. Motor vehicles owned by the commonwealth or any of its political subdivisions and motor vehicles engaged

under contract with the commonwealth in the transportation of garbage or refuse shall be exempt from the provisions of this section; provided, however, that a city or town may recommend to the department of highways, in writing, an alternative route of travel for such motor vehicles whereby the noise or nuisance incident to such travel shall be minimized or abated and said department shall consider such alterations or changes in the travel routes of such motor vehicles as will result in the minimization of such noise or nuisance.

Mass. Gen. L. ch. 111, § 31B

§ 31B. Rules and Regulations for Removal of Garbage.

Boards of health shall, from time to time, make rules and regulations for the control of the removal, transportation or disposal of garbage, offal or other offensive substances. Whoever violates any provision of section thirty-one A, or of any rule or regulation made thereunder, shall be punished by a fine of not more than one thousand dollars.